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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFAEL FUENTES LOPEZ,

Defendant and Appellant.

F075992

(Super. Ct. No. VCF334694)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Brett R. Alldredge, Judge.

Nuttall Coleman & Drandell and Roger T. Nuttall; Page Law Firm and Edgar E. Page for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez, Sarah J. Jacobs, and Cavan M. Cox II, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Rafael Fuentes Lopez pled no contest to four counts of lewd acts upon a minor (Pen. Code, § 288, subd. (a)).[1] After so pleading, he obtained new counsel and filed a motion to withdraw his plea. The trial court denied his motion and subsequently sentenced him to 12 years in prison. Appellant raises several issues with regard to the trial court's denial of his motion. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In order to put appellant's complaints in proper perspective, we set forth pertinent parts of the record in detail.

Facts Underlying Appellant's Offenses

We have obtained the facts underlying appellant's offenses from the probation report, which summarized the facts from the police reports. According to appellant's probation report, when the victim was 16 years old, he told his father that appellant, his maternal uncle, had sexually assaulted him when he was 11 or 12 years old. The victim's father reported this allegation to the Tulare County Sheriff's Department, and the victim was interviewed by investigators on June 1, 2015.

The victim told investigators appellant first molested him when he was 11 years old. During a family gathering when the victim was in his bedroom, and everyone else was outside, appellant entered the victim's bedroom and told him if he did not submit to his sexual advances, he would assault or kill the victim's parents. Appellant then pulled down the victim's pants and penetrated the victim's anus with his penis. The victim reported that on a separate occasion when his parents took him to visit appellant's family, the victim was watching television in a bedroom and appellant entered and began touching the victim's buttocks over his clothing. The victim stopped this by exiting his

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[1] All further undesignated statutory references are to the Penal Code.

bedroom. The victim did not tell his parents because he feared appellant would hurt them.

The investigators interviewed appellant on April 26, 2016. Appellant told investigators when he and his family would visit the victim's family, the victim liked to touch appellant's penis, and appellant allowed him to do it five or six times. Appellant was not aroused the first time it happened but admitted getting erections on other occasions. Appellant said he allowed the victim to touch his penis as a demonstration of his love for him. According to the probation report, appellant also admitted to having anal sex with the victim once or twice, and the last time was in 2014 when the victim was around 14 or 15 years old. Appellant also admitted to touching the victim's buttocks once or twice when the victim was the same age. The probation report stated appellant denied threatening the victim or his family and denied inserting his penis into the victim's anus but admitted putting his finger in the victim's buttocks. Appellant was arrested following this interview.

The following day, the victim was interviewed a second time. The victim again reported appellant penetrated the victim's anus with his penis for the first time when he was 11 years old. The victim said the act lasted approximately five minutes. The victim said appellant inserted his penis into the victim's anus a second time approximately six months later. On both occasions, the victim tried to get away but could not because appellant had his hands around the victim's waist. The victim also said appellant sometimes slept in the victim's room and on some occasions, appellant would reach into the victim's shorts, touch his buttocks, and insert his finger into the victim's anus.

Complaint

The day after the victim gave his second interview, the district attorney's office filed a complaint charging appellant with a lewd act upon a child, to wit, "penis to buttock 1st time" (§ 288, subd. (a); count 1); a lewd act upon a child, to wit, "penis to

buttock last time" (§ 288, subd. (a); count 2); a lewd act upon a child, to wit, "hand to buttock 1st time" (§ 288, subd. (a); count 3); and a lewd act upon a child, to wit, "hand to buttock last time" (§ 288, subd. (a); count 4). (Capitalization omitted.) It was alleged the victim was under 14 years of age, and the dates alleged for each count was between November 18, 2009, and November 17, 2013. At appellant's arraignment, he pled not guilty to the charges.

Change of Plea

On the day scheduled for appellant's preliminary hearing, appellant requested to change his plea and pled no contest to the charges for an indicated sentence of 12 years in prison. Before accepting appellant's plea, the court engaged in the following exchange with him:

> "[THE COURT:] First and foremost, it's my obligation to make sure that you are making this important decision absolutely freely and voluntarily. Is in fact that the case?
>
> "[APPELLANT]: Yes.
>
> "THE COURT: Have you had a full and complete opportunity to discuss with your lawyer everything that the People would have to prove, the elements of the crimes charged against you, possible defenses that you would have at trial, and are you fully satisfied with the advice that you've received from your attorney?
>
> "[APPELLANT]: Yes.
>
> "THE COURT: Do you clearly understand that once you make this important decision, it is absolutely final, and you cannot change your mind?
>
> "[APPELLANT]: Yes.
>
> "THE COURT: Do you understand that if you are not a citizen, your plea will lead to your immediate deportation, a denial of citizenship or naturalization, or admission into the United States?
>
> "[APPELLANT]: Yes.

"THE COURT: Do you understand that each and every one of these counts is defined as a serious felony within the penal code; in other words, it is a strike offense, and it will have at least the following consequences:

"Number one, I am presumed not to consider you an eligible candidate for probation, and that is absolutely not contemplated in this sentence.

"Number two, any credits that you may be allowed to earn while you serve your prison term may be limited. And I make no representations to you as to what those credits are.

"And three, once you are released from prison, should you commit any felony, any sentencing choice made by a Judge will be presumed to be doubled.

"Should you commit and be convicted of a serious or violent felony, the presumed sentence is life in prison without the possibility of parole.

"Do you understand that?

"[APPELLANT]: Yes.

"THE COURT: Do you understand because of the nature of the crimes charged that you will be ordered to register as a sex offender for life? And that if you do not comply with those regulations, you can be charged with a separate crime and returned back to prison?

"[APPELLANT]: Yes.

"THE COURT: Let me now shift to what are some of your procedural and constitutional rights.

"Your first procedural right is to a preliminary hearing. That was scheduled for today. The district attorney is obligated to put on evidence to convince the Court that a trial is justified in your case.

"If you're bound over by the Judge, your right is to a speedy, public jury trial.

"At all times when you make appearances in court, [your attorney] is at your side, and you have the right with him and through him to see, hear, and cross-examine every witness that's called by the district

attorney in their attempt to prove these elements against you beyond a reasonable doubt. You have no obligation to prove anything.

"If you have your own witnesses however that you would like to come into court and testify for you, [your attorney] may subpoena them into court at no cost to you.

"You have an absolute right against self-incrimination, which means that no one can force you to testify, admit to anything, or offer evidence that can be used to help the People prosecute you. On the other hand, with the advice of your lawyer, you may choose to waive that right and testify yourself to tell the jury your side of the story under oath.

"Do you understand and do you clearly waive each and every one of those important rights?

"[APPELLANT]: Yes."

The court then had the following exchange with appellant's attorney:

"THE COURT: [Counsel], have you had a full and complete opportunity to discuss the elements of the crimes charged, possible defenses with [appellant]?

"[DEFENSE COUNSEL]: I have, Your Honor.

"THE COURT: In your judgment and experience, is he making this most important decision absolutely freely and absolutely voluntarily?

"[DEFENSE COUNSEL]: Yes, Your Honor.

"THE COURT: Do you believe that he clearly understands the important rights that he is waiving, as well as all consequences, both direct and indirect, to his anticipated plea?

"[DEFENSE COUNSEL]: Yes, Your Honor. [¶] . . . [¶]

"THE COURT: Do you and the prosecutor stipulate that the police report contains a factual basis sufficient for me to accept his felony plea?

"[DEFENSE COUNSEL]: I do, Your Honor.

"[PROSECUTOR]: Yes, Your Honor.

"THE COURT: [Prosecutor], are there any other admonitions that you believe that I have not covered, given the nature of the charges in this case? [¶] . . . [¶]

"[PROSECUTOR]: . . . I believe everything's been covered."

Following these colloquies, appellant pled no contest to all counts.

Substitution of Attorney and Motion to Withdraw Plea

Approximately three months after appellant pled no contest, appellant filed a substitution of attorney. Approximately two months after filing the substitution, appellant filed a motion to withdraw his plea.

Appellant alleged in the memorandum of points and authorities in support of his motion, that a "careful reading" of the transcript of his interview with police showed appellant "did not, in that interview, admit to a factual context which would support a factual basis for the Counts, as alleged." Appellant explained that in his statement to law enforcement, he denied the conduct alleged in counts 1 and 2, namely, that he penetrated the victim's buttocks with his penis. Appellant also alleged it was "questionable" whether appellant's statement provided a factual basis for the intent element of counts 3 and 4, based on appellant's statement, " 'I didn't want to do dirty things with [the victim].' "

Appellant claimed he was never advised by initial counsel that the acts must have been committed "in a lewd and lascivious manner and with the intent of arousing, appealing to and gratifying his lust, passions and desires, as well as those of the . . . child."

Appellant alleged "there exists an element of duress in that [appellant] believed that he had no choice but to admit the allegations, based upon his then counsel's advice to him that under the facts of the case (interview), there was no other alternative. In this sense, the exercise of free judg[]ment by [appellant] had been curtailed at the time of the entry of the no contest pleas."

Appellant pointed out he was not advised of his constitutional rights against self-incrimination prior to engaging in the interview with law enforcement.

In support of his motion, appellant attached the following declaration:

> "1. I am the defendant in the above entitled matter.
>
> "2. On October 27, 2016, I was advised by my attorney at that time that based upon the facts of the case, and in particular, the statement which I made to law enforcement, that I needed to plead guilty or no contest to all counts in order to avoid a more harsh sentence than that which was mentioned at the time that I entered the pleas. While I told my attorney that I did not believe that I was guilty of the charges, he advised me that the evidence, including my statement to the police, was such that admitting guilt was required and in my best interest.
>
> "3. At no time previous to October 27, 2016, was I able to review the recording or transcript of my interview with law enforcement. After the no contest pleas, the attorney visited me and played a portion of the tape.
>
> "4. I first became aware of the actual and specific contents of the interview after meeting with attorney Roger Nuttall and his interpreter Salvador Ceja in the Bob Wiley facility near Visalia, subsequent to October 27, 2016.
>
> "5. At no time previous to the hearing on October 27, 2016, was I advised of the legal requirements which relate to the intent and mental state necessary to be convicted of the charges which were alleged against me.
>
> "6. I know now what is required to be proved as to counts 1, 2, 3, and 4, and based upon my recollection of events which have led to the charges, and based upon what I understand are the legal requirements in order to be convicted, I do not believe that I am guilty of those charges.
>
> "7. Had I actually known the legal requirements which are required for a conviction, I would not have entered no contest pleas on October 27, 2016.

> "8. Had I known that I was in fact not required to enter the no contest pleas under the circumstances or in order to avoid the possibility of a harsher sentence, I would not have agreed to enter those pleas.
>
> "9. Based upon that which is stated in the pleadings which have been prepared by Mr. Nuttall and that which is contained in this declaration, I believe that I should be allowed to withdraw the no contest pleas."

Appellant also attached a transcript of his interview with the police translated by a certified Spanish translator, as much of the interview was conducted in the Spanish language. During this interview, appellant explained that he used to visit the victim's family but had not done so in approximately a year because the victim's father "thought I had raped the [victim] and told me he was going to report it. And I never did that, I didn't rape him."

Appellant then explained that the victim liked to touch appellant's penis. He said it started about 10 years ago, when the victim was probably 11 years old and happened about five times. Appellant admitted to getting an erection on some of the occasions when the victim would touch his penis. Appellant admitted he ejaculated on one occasion when the victim touched him about two years prior to the interview. Appellant said he let the victim touch appellant's penis because "sometimes kids don't get affection from their father and I thought he wanted to touch me because he needed affection." Appellant denied touching the victim's penis but said he touched the victim's buttocks one or two times when the victim was 14 or 15 years old. Appellant put his hand in between the victim's buttock cheeks, but not in his anus. When the investigator told appellant that the victim said appellant put his finger in the victim's anus, appellant responded that he (appellant) did not remember.

The investigators asked appellant in English how many times appellant had anal sex with the victim, and appellant responded in English "[p]robably like one, two, three times," "[y]eah, probably like three times." Appellant said in English the first time was

when the victim was around 13 or 14 years old. Appellant said the victim did not put his penis in appellant's anus. The investigator asked in Spanish, "Only you to him?" Appellant then said in Spanish he never put his penis into the victim's anus. Appellant subsequently repeatedly denied putting his penis in the victim's anus.

Appellant denied threatening the victim's family. Appellant denied touching other children and mentioned that the victim had a little brother and "I would have touched [the little brother] if I liked doing that."

At the hearing on appellant's motion, the trial court said, "I understand how the attached transcript relates to the ultimate question to be determined by me, but it seems to be a collateral issue. In other words, this Court at no time took [appellant's] plea with a reference to that interview. The existence of that interview, as far as I know, came to the Court's attention only in the file of your plea." The court explained its perspective that the voir dire of appellant and initial counsel at the time it took appellant's plea could not have been more thorough. The court suggested that appellant's argument that the interview did not contain a factual basis for the plea was weakened by the fact that the parties stipulated to a factual basis for the plea. The court explained the voir dire at the time of appellant's plea of both appellant and his initial counsel established that the initial counsel had discussed the elements of the crimes charged and possible defenses to the crimes with appellant. The court found that appellant's declaration was "self-serving" and not sufficient to support the motion.

In response to the court's comments, defense counsel said, "we concede that the Court did a thorough job in taking the plea. I mean, I'm not—I'm unable to suggest any sort of deficit there. That's really not—and I understand that that is potentially a difficulty as related to this motion." Defense counsel went on to argue that the interview did not present a factual basis to support the pleas. The court asked whether defense counsel was suggesting the police report was void of any other evidence that supported

the elements of the crime but for appellant's alleged confession. Defense counsel responded: "[W]hat I'm saying is a close look and a legitimate scrutiny of the interview transcript . . . does not support the concept that [appellant] confessed to these crimes."

The court asked the prosecutor what appellant's maximum penal exposure would have been, and the prosecutor responded that appellant was facing 14 years as of the preliminary hearing, and that she "had discussed with [initial counsel] at the preliminary hearing the victim would be testifying, and based on that testimony, I believe there may have been sufficient evidence to charge life crimes. And that was known to [initial counsel] at the time of [the] preliminary hearing."

Defense counsel argued that appellant was led to believe that his attorney believed he had confessed to the crime and had no choice but to enter a plea based on that confession. Defense counsel explained that the detective "was attempting to elicit admissions, confessions in the English language." Defense counsel argued appellant was not only acting under mistake and ignorance but "essential duress based upon the advice given to him by his counsel." Defense counsel said, "[appellant] was under the impression by virtue of his advice that there was no alternative to him but to enter the pleas and thereby, what we are saying is his exercise of free judgment had been curtailed under those circumstances."

The court responded, "Respectfully, if that's true, isn't your best evidence a declaration from [initial counsel] who would say exactly what you are suggesting that comes from [appellant]? If, in fact, that happened, and [initial counsel] had filed a declaration saying you bet, I told him to plead based solely on his confession and not on anything else. Based on—I mean, I did read the transcript. Then the attention goes to that. Then I would be faced with a situation his then attorney saying we got no case based upon your declaration and the review—based upon the confession, then the review of the confession becomes irrelevant."

As the court was about to make its ruling denying appellant's motion, defense counsel requested a continuance in order to request a declaration from initial counsel. The court granted the continuance noting the only evidence that the court would consider is a declaration from initial counsel that said he advised his client he had "no chance whatsoever solely because of the confession."

When the court reconvened for appellant's continued sentencing, defense counsel informed the court that initial counsel "respectfully declined to do a declaration." The court denied the motion and sentenced appellant pursuant to his plea agreement. As to count 1, appellant was sentenced to the middle term of six years in prison. As to counts 2, 3, and 4, appellant was sentenced to consecutive terms of two years each (one-third the middle term). Appellant's total prison sentence was 12 years.

DISCUSSION

I. Denial of Appellant's Motion to Withdraw Plea

Appellant argues the trial court erred by denying his motion to withdraw his plea. We disagree.

A plea of guilty or no contest effects a waiver of several fundamental rights under both the state and federal Constitutions, and therefore must be entered knowingly, intelligently, and voluntarily. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242; *People v. Collins* (2001) 26 Cal.4th 297, 305.) A defendant may withdraw a plea of guilty or no contest upon establishing good cause. (§ 1018.) To establish good cause, it must be shown that the defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. (*People v. Johnson* (2009) 47 Cal.4th 668, 679; *People v. Cruz* (1974) 12 Cal.3d 562, 566.) "Other factors overcoming defendant's free judgment include inadvertence, fraud or duress." (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.)

A defendant seeking to withdraw his plea bears the burden of establishing good cause by clear and convincing evidence, and the denial of a motion to withdraw plea is reviewed for abuse of discretion. (*People v. Patterson* (2017) 2 Cal.5th 885, 894; *People v. Ravaux* (2006) 142 Cal.App.4th 914, 917 (*Ravaux*).) The reviewing court must adopt the trial court's factual findings if supported by substantial evidence. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254; *People v. Breslin* (2012) 205 Cal.App.4th 1409, 1416.)

Here, we find no reason to disturb the trial court's exercise of discretion in denying appellant's motion to withdraw his plea. The trial court considered appellant's arguments and found the evidence offered in support was not sufficient to carry appellant's burden.

The trial court found appellant's declaration "self-serving" and insufficient to support his motion without corroboration. It follows that the trial court found appellant's claims that he did not know the elements of the crime and that initial counsel told him he was required to enter a plea based on his statements to the police not credible. This was reasonable considering appellant's statements on the record at his change of plea hearing that initial counsel explained the elements of and possible defenses to the crimes and that appellant understood he had rights to a preliminary hearing and a trial and was waiving those rights by pleading. Further, "[i]t is entirely within the trial court's discretion to consider its own observations of the defendant," and, furthermore, the court may "take into account the defendant's credibility and his interest in the outcome of the proceedings." (*Ravaux*, *supra*, 142 Cal.App.4th at p. 918.) We defer to the trial court's credibility determination of appellant's declaration and are not required to accept any claims made by appellant in his declaration. Rather, it would be inappropriate for us to rely on appellant's statements found not credible by the trial court based on our role on review.

The trial court placed little weight on defense counsel's premise that parts of appellant's statement to law enforcement did not provide a factual basis for the plea due to a language barrier. This was not unreasonable. As the trial court pointed out, the interview was not referenced as the sole factual basis for the plea. To the contrary, the factual basis for the plea was referenced as the police report. According to the probation report, the police reports contained the victim's statements, which provided an adequate factual basis for the plea. We conclude the trial court did not abuse its discretion by denying appellant's motion.

Appellant claims on appeal that because he provided initial counsel with the motion and attachments, initial counsel's declining to provide a declaration should be considered an "adoptive admission" under Evidence Code section 1221. Evidence Code section 1221 reads: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." Appellant contends this "adoptive admission" constitutes good cause for appellant being allowed to withdraw his plea, and independently corroborated appellant's declaration.

Because appellant did not request the trial court to consider initial counsel's declining to provide a declaration as an adoptive admission or as evidence in any way supporting good cause to withdraw his plea, we conclude the issue is forfeited.

Appellant concedes he did not raise the issue below but contends he is entitled to raise it for the first time on appeal because "the application of Evidence Code section 1221 is relevant to the holdings made and published while his appeal has been pending." Appellant makes this assertion without explanation. Appellant also argues similarly, without explanation, that the case " 'poses an issue of broad public interest that is likely to recur.' " Appellant also claims we should consider this issue because " 'it presents a

question of law arising from undisputed facts' " then states the parties dispute the fact of whether initial counsel was a " 'party' " to the proceedings. We decline to exercise discretion to address the issue for any of the reasons set forth by appellant.

Appellant also argues initial counsel's ineffective assistance of counsel constituted good cause to withdraw his plea and that the court misapplied *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*) in denying his motion. As appellant did not raise this issue below, we reject this claim based on forfeiture as well. Appellant admits in his reply brief that "no specific citation to *Strickland* was made, nor were the words 'ineffective assistance of counsel' uttered in the pleadings or during the argument." Still, he contends the "essence of that claim was advanced." We do not find on this record that the issue was properly before the trial court.

We conclude the trial court did not abuse its discretion by denying appellant's motion.

II. Alleged Ineffective Assistance of Counsel on Direct Appeal

Appellant claims on direct appeal his initial counsel provided ineffective assistance in two ways: (1) initial counsel did not "correctly assess the facts and the law as to each element of the allegations when evaluating what Appellant actually said during the interrogation before insisting that Appellant had to accept the plea" (underlining omitted); and (2) initial counsel "did not take any steps to protect Appellant's fundamental constitutional rights by filing a motion to suppress Appellant's statements obtained during an interrogation where due to the nature of the interrogation tactics used Appellant's statements were obtained in violation of Appellant's *Miranda* [*v. Arizona* (1966) 384 U.S. 436] rights" (underlining omitted).

To prevail on an ineffective assistance of counsel claim, appellant must establish that (1) the performance of his trial counsel fell below an objective standard of reasonableness and (2) prejudice occurred as a result. (*Strickland*, *supra*, 466 U.S. at

p. 687; *People v. Anderson* (2001) 25 Cal.4th 543, 569.) "When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an appellate claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009, italics omitted.)

Appellant's first claim that initial counsel did not "correctly assess the facts and the law as to each element of the allegations when evaluating what Appellant actually said during the interrogation before insisting that Appellant had to accept the plea" (underlining omitted), is premised on his assertion that "[i]nitial counsel's assessment of the content of the interrogation was that Appellant had admitted to <u>all</u> the elements of each allegation, and thereby misapplied the law and the facts particularly respecting the intent element for <u>each</u> count." Appellant makes similar assertions throughout his briefing. This appears to be an extrapolation from his own declaration,[2] but we do not agree that appellant's declaration supports such an assertion.

In appellant's declaration, appellant declared that initial counsel advised him that "*based upon the facts of the case, <u>and</u>* in particular, the statement which I made to law enforcement, that I needed to plead guilty or no contest . . . to avoid a more harsh sentence" and that "the *evidence, <u>including</u>* my statement to the police, was such that admitting guilt was required and in my best interest." (Italics & underlining added.)

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2 We defer to the trial court's implicit determination that appellant's declaration was not credible without independent corroboration.

These statements show initial counsel believed appellant's interview was unfavorable to his case[3] but do not support the assertion that initial counsel believed appellant had admitted each element of every count nor that he misread the interview or advised him based on that belief. In our reading of appellant's declaration, it appears initial counsel based his advice on the totality of the evidence, including appellant's statement, the victim's statements, and possibly additional evidence shared with initial counsel by the prosecutor that would be adduced through the preliminary examination. Because we find the factual assertion underlying appellant's first claim of ineffective assistance of counsel is not supported by the record, we need not address its merits, and reject his claim.

As for appellant's second claim that initial counsel provided ineffective assistance by failing to move to suppress appellant's statements to law enforcement, appellant contends his statements were taken in violation of *Miranda*, and that initial counsel would have been successful in moving to suppress his statement. Respondent asserts the record is lacking to resolve the merits of such a claim. We agree with respondent's assessment. "[O]ur review on a direct appeal is limited to the appellate record." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1183.) Stated another way, " 'Appellate jurisdiction is limited to the four corners of the record on appeal . . . .' " (*People v. Waidla* (2000) 22 Cal.4th 690, 743.) When a defendant's claim "is dependent upon evidence and matters not reflected in the record on appeal," we will not consider it on appeal. (*People v. Barnett*, *supra*, at p. 1183.)

Here, there are no facts on the record regarding the circumstances of the interview besides what can be culled from the transcript and the statement in the probation report that the detective contacted appellant at his home. We are not aware of the exact location

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3 That the interview was unfavorable to his case is supported by the record. Appellant admitted to allowing the victim to touch his penis, getting erections from this act, and ejaculating on one occasion. Appellant also admitted to touching the victim's buttocks.

of the interview, the circumstances leading up to appellant agreeing to be interviewed, or whether anyone else was present and, if so, whom. For these reasons, we cannot determine from this record whether the statement was taken in violation of *Miranda* or whether initial counsel was ineffective by failing to move to suppress the statement.

Appellant argues *People v. Saldana* (2018) 19 Cal.App.5th 432 (*Saldana*) and *People v. Torres* (2018) 25 Cal.App.5th 162 (*Torres*) demonstrate that the circumstances of appellant's statement constituted custodial interrogation, requiring law enforcement to have given appellant a *Miranda* advisement. Appellant relies on these cases to support his claims that a motion to suppress his interview would have been successful, and as such, initial counsel was ineffective for failing to move to suppress it. Appellant also requests this court to reverse with directions to suppress appellant's statements, citing no authority to support that this would be the appropriate remedy. Even based on the very limited facts regarding the circumstances of appellant's interview, these cases are clearly distinguishable.

In *Saldana*, the defendant was interviewed in a police station interrogation room behind a closed door. (*Saldana*, *supra*, 19 Cal.App.5th at p. 456.) The *Saldana* court noted a police station interrogation did not necessarily require *Miranda* warnings, but that at the police station, " ' "the investigator possesses all the advantages." ' " (*Ibid*.) The *Saldana* court found that this combined with the investigators indicating they had resolute belief in the defendant's guilt and would not take no for an answer, among other factors, constituted custodial interrogation and required *Miranda* advisements. (*Id*. at pp. 457–458, 461.)

In *Torres*, the defendant was contacted in his home and then placed into the police car for privacy to obtain his statement. (*Torres*, *supra*, 25 Cal.App.5th at p. 167.) The detectives then told the defendant that they would not leave, and the defendant could not return home until the defendant stopped lying and confessed. (*Id*. at p. 179.) The

detectives had also told the defendant they had a DNA test running in the trunk. (*Ibid*.) The *Torres* court found the totality of these circumstances constituted custodial interrogation requiring the police to have given the defendant *Miranda* advisements. (*Id*. at p. 180.)

Here, again, we cannot adequately address the issue, but there is no evidence appellant was interviewed at the police station as in *Saldana*, and there is no evidence appellant was placed in a police car and told he could not leave until he confessed, as in *Torres*. Even with this limited record, we find these cases significantly distinguishable.

Appellant has not established initial counsel provided ineffective assistance of counsel on this record.

III. Alleged Violation of Appellant's Sixth Amendment Right to Autonomy

Appellant contends that his Sixth Amendment secured autonomy was violated by initial counsel's advisement to enter into a plea, relying on *McCoy v. Louisiana* (2018) 584 U.S ___ [138 S.Ct. 1500] (*McCoy*). Appellant contends this constituted structural error and he is entitled to reversal without a showing of prejudice. This claim fails.

In *McCoy*, despite the defendant's vociferous insistence he did not engage in the charged acts and adamant objection to any admission of guilt, the trial court permitted defense counsel at the guilt phase of a capital trial to tell the jury the defendant " 'committed three murders. . . . [H]e's guilty.' " (*McCoy*, *supra*, 584 U.S. ___ [138 S.Ct. at p. 1505].) The United States Supreme Court held "that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." (*Ibid*.) The court went on to state: "Guaranteeing a defendant the right 'to have the Assistance of Counsel for his defen[s]e,' the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the

hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." (*Ibid*., italics omitted.) The *McCoy* court noted that some decisions are grounded in a defendant's autonomy, and "are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." (*Id*. at p.___ [138 S.Ct. at p. 1508].) The court held the error was structural and remanded the matter for a new trial. (*Id*. at p.___ [138 S.Ct. at p. 1512].)

Appellant claims the court violated his protected autonomy right when it " 'allowed counsel to usurp control' " of whether appellant pled to the charges. *McCoy* is distinguishable because there, the defendant "vociferously" insisted he did not commit the charges and "adamantly" objected to the admission of guilt. (*McCoy*, *supra*, 584 U.S. at p. ___ [138 S.Ct. at p. 1505].) Here, there was no such objection on the record by appellant. Rather, he told the trial court he was freely and voluntarily pleading no contest. Appellant's claim on appeal is premised on his contention that "[a]ppellant's initial counsel had been mistaken in his assessment of his statements to the police, that having been one of [the] reasons initial counsel compelled Appellant to accept a guilty plea." First, as we have explained, there is no evidence on the record to support appellant's repeated assertion that initial counsel was "mistaken in his assessment of his statements to the police." Second, there is no evidence initial counsel "compelled" appellant to plead no contest. We conclude there was no violation of appellant's Sixth Amendment secured autonomy right.

IV. Cumulative Error

Finally, appellant argues the cumulative effect of the errors was prejudicial: "the deprivation of his Sixth Amendment secured autonomous rights"; "his initial counsel's ineffective representation by not taking appropriate steps to suppress the statements made during the interrogation when Appellant had not been given a *Miranda* advisement"; "his

initial counsel's ineffective representation by mistakenly believing Appellant had admitted to all the elements of each allegation when the transcript does not support this assessment"; "Appellant entered into the plea agreement under a mistake of fact"; and "Appellant entered into the plea agreement through duress." Because we find none of these claims constituted error, we reject appellant's cumulative error claim. (See *People v. Phillips* (2000) 22 Cal.4th 226, 244.)

We conclude appellant has shown no reversible error. To the extent we do not expressly discuss any point raised in appellant's briefs, we have considered and rejected it. (See *People v. Clair* (1992) 2 Cal.4th 629, 691, fn. 17; *People v. Sully* (1991) 53 Cal.3d 1195, 1252.)

DISPOSITION

The judgment is affirmed.

DE SANTOS, J.

WE CONCUR:

HILL, P.J.

FRANSON, J.